**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 633 OF 1998.**

1. Hariram Padam Patil.
2. Dwarkanath Padam Patil,
   Both residing at Patil House,
   Eksar, Dattapara, Borivali
   (West), Mumbai.400 092.

3. Mrs.Tarabai Balkrishna Kini,
   residing at Kini House,
   Dahisar Village, Mumbai,.

4. Thakubai Sitaram Patil,
   residing at Patil House, Eksar,
   Dattaopada, Borivali (W),
   Mumbai 400 092.

5. Kamalakar Jeevan Patil,
6. Yeshwant Jeevan Patil,
   both residing at Patil House,
   Eksar, Dattapada, Borivali
   (West), Mumbai.

7. Mrs.Mankubai Ramchandra Kini,
   residing at Simpoli Village,
   Borivali (West), Mumbai. .... Appellants.
   (Org.Plaintiffs)

Versus.

1. Mrs.Joaquina Petrocina Cardoz,
   residing at Plot No.13 & 14.
   Holly Cross Road, Borivali
   (West), Mumbai.

2. Mr.Joseph Salvador Aguiar,
   residing at Plot No.15.
   Holly Cross Road, Borivali
   (West), Mumbai.

3. Smt.Pedrina D’Costa.
4. Salvino D’Costa
   residing at Plot No.17.
   Holly Cross Road, Borivali
   (West), Mumbai.

5. Mr.Basil John Tony Monterio
   residing at Plot No.18.
   Holly Cross Road, Borivali
   (West), Mumbai.

6. Mr.Christopher Pereira,
   residing at Plot no.19.
   Holly Cross Road, Borivali
   (West), Mumbai.

7. Smt.Conceicao Rosilina Mendes,
   residing at Plot No.20.
   Holly Cross Road, Borivali
   (West), Mumbai.

8. Richard Andrela,
   residing at Plot No.21.
   Holly Cross Road, Borivali
   (West), Mumbai.

9. Mrs.Vincentina
   residing at Plot No.22.
   Holly Cross Road, Borivali
   (West), Mumbai.

10. Mr.Mrvyn Joseph Cardoz,
    residing at Plot No.24 & 25.
    Holly Cross Road, Borivali
    (West), Mumbai.

11. Mr.Braz Fernandes,
    residing at Plot No.26.
    Holly Cross Road, Borivali
    (West), Mumbai.

12. Mr.Alexio Assumption,
    residing at Plot No.27.
    Holly Cross Road, Borivali
    (West), Mumbai.

13. Josefina Florina D’Souza Lobo,
    residing at Plot Nos.1 & 4.
    Holly Cross Raod, Borivali
    (West), Mumbai.

14. Mariano Assumption Manezers,
15. Maria Mina Philomena,
    both residing at Plot No.2.

Holly Cross Road, Borivali
(West), Mumbai.

16. Mrs.Henry Lobo,
residing at Plot No.3.
Holly Cross Road, Borivali
(West), Mumbai.

17. Mr.Benny Menezees,
residing at Plot No.5.
Holly Cross Road, Borivali
(West), Mumbai.

18. Dr.T.N.Paul
19. Dr.(Mrs.) T.Paul
both residing at Plot Nos.6 & 7.
Holly Cross Road, Borivali
(West), Mumbai.

20. Mr.Manoel Mendes,
residing at Plot No.8.
Holly Cross Road, Borivali
(West), Mumbai.

21. Mrs.Anarita Anastesia D’Souza,
residing at Plot No.9,
Holly Cross Road, Borivali
(West), Mumbai.

22. Mrs.Jacinta Fernandes,
residing at plot No.10.
Holly Cross Road, Borivali
(West), Mumbai.

23. Mr.Sharad Sample,
residing at Plot No.11.
Holly Cross Road, Borivali
(West), Mumbai.

24. Mr.Joao Philip Fernandes,
residing at plot No.28,
Holly Cross Road, Borivali
(West), Mumbai.

25. Mrs.Nathalia D’Mello,
residing at Plot No.29.
Holly Cross Road, Borivali
(West), Mumbai.

Shri K.H.Modi i/by M/s.Pathak & Co.for the Appellants.

Shri V.T.Lulia for the Respondent No.10.

**CORAM : ABHAY S. OKA, J.**

**DATED : 21st March, 2005.**

**ORAL JUDGMENT.**

1. Heard the learned Counsel for the Appellant and the learned Counsel appearing for the Respondent No.10. The order dated 7th July 2003 shows that the Appeal has already been dismissed as against the Respondents Nos.1, 12, 17 to 19. The office noting dated 27th October 2004 shows that the Appeal stands dismissed as against the Respondents Nos.8, 9, 16, 20, 22, 24, and 25. The learned Counsel appearing for the Appellant has filed affidavit of service in respect of rest of the Respondents.

2. The challenge in this Appeal from Order is to the Judgment and Order dated 16th March 1998 passed by the learned trial Judge on Notice of Motion No.5405 of 1992 taken out by the Appellants/original Plaintiffs. On 4th November 1997 the suit filed by the Appellant was dismissed for default. Immediately on the next day i.e. on 5th November 1997 Notice of Motion No.5405 of 1992 was taken out for restoration of the suit.

3. The learned trial Judge by the impugned order has rejected the prayer for restoration of the suit. The learned trial Judge held that on the date on which the suit was dismissed for default, it was placed for directions and on that day the Appellants remained absent. The learned trial Judge held that it was for the Appellants to remain present personally whenever the suit was fixed for directions and there was no explanation in the affidavit-in-support as to why the Advocate on record of the Appellants was absent on the date on which the suit was dismissed.

4. The learned Counsel appearing for the Appellant submitted that on the very day on which the suit was dismissed for default, an oral prayer was made for restoration of the suit and in view of the law laid down in a decision of the Special Bench of this Court reported in AIR 1938 Bombay page 199 (P.D.Shamdesani & others v/s. Central Bank of India Ltd.) the suit should have been restored as oral prayer was made for the restoration on the very day on which the suit was dismissed for default. He submitted that in any event the Notice of Motion was taken out immediately on the next day for restoration and therefore, the learned

trial Judge should have taken a liberal view of the matter and restored the suit.

5. The learned Counsel appearing for the Respondent No.10 submitted that when the suit was fixed for direction the Appellants were under an obligation to remain present and to point out the status regarding the service of summons on various Defendants. He submitted that the suit was fixed for dismissal and the Appellants and their Advocate should have been careful and they should have diligently attended the Court on that day. He, therefore, submitted that no interference was called for.

6. I have considered the rival submissions. In the affidavit-in-support to the Notice of Motion, it is stated by the Appellants that the suit appeared under the caption of direction from time to time and direction given by the learned trial Judge by order dated 15th July 1997 for effecting service of summons on the unserved Defendants was complied with by effecting service by substituted service.

7. It is stated in the affidavit-in-support that in the morning session on 4th November 1997, a Counsel was

briefed to appear and point out to the Court the compliance with earlier direction. According to the Appellants the Counsel was present in the Court in the morning session. The matter did not reach hearing till 2.00 p.m. It is contended that the Clerk of the Appellants' Advocate was under the impression that since the matter did not reach hearing in the morning session, the matter was adjourned to some other date. When he realised that the matter was retained in the afternoon session, he contacted the Counsel who immediately rushed to the Court and by that time, the suit was dismissed for default. It is stated in the affidavit that the learned Counsel had made an oral application for restoration. However, the learned trial Judge directed that appropriate application in writing should be taken out for restoration. There is also an affidavit in support filed by the Clerk of the Advocate engaged by the Appellants. The Respondent No.10 has filed an affidavit-in-reply. The averments made in the affidavit in support by the Appellants regarding the oral application made for restoration of the appeal are in paragraph 6 of the affidavit in support. The said averments are dealt with in paragraph 9 of the affidavit in reply by the Respondent No.10. In paragraph 9 of the reply affidavit, there is no specific denial of the fact

that an application for restoration was orally made by the Counsel appearing for the Appellants on the same day on which the suit was dismissed for default. Even in the impugned order there is no finding recorded by the learned trial Judge that what is stated in paragraph 6 of the affidavit in support is not correct.

8. The Special Bench of this Court in the case of P.D.Shamdesani (supra) held as under:

> "In all cases in which applications are made to restore matters summarily dismissed, there is nearly always some degree of carelessness or negligence on the part of the applicant. But if a person, whose suit has been dismissed summarily, appears on the same day, and produces not some unreasonable excuse for his absence, prima facie the Court ought to exercise its discretion in his favour. Of course the applicant has no absolute right to ask the Court to waive its rule in his favour, but it s a good working rule that if he applies at once, and thereby shows that his failure to appear was not due to a desire to cause delay, but was bona fide, he ought generally to be

> given the right to have his case restored on payment of costs thrown away. It is a very serious matter to dismiss a man’s suit or summons, or whatever it may be, without hearing it, and that course ought not to be adopted unless the Court is really satisfied that justice so requires. Thus a Court should refuse to restore a matter, only if there is gross negligence or gross carelessness."

9. Apart from the said decision, the affidavit in support of the Appellant and the affidavit of the Clerk of their Advocate make out a case for restoration of the suit. When the Counsel of the Appellants was admittedly present in the morning session and for the reasons set out in the affidavit in support, if he did not remain present at the time when the suit was called out, the Appellants cannot be allowed to suffer.

10. The learned trial Judge should have adopted a liberal approach in view of the fact that the application for restoration was made immediately on the next day after the suit was dismissed for default.

11. In view of what is stated above, a case for

restoration of the suit is made out. The prejudice that may be caused to the Respondent No.10 can be compensated by payment of costs. The amount is costs is quantified at Rs.5000/-.

12. Hence I pass the following order:

(i) The impugned Judgment and Order dated 16th March 1998 is quashed and set aside and the Notice of Motion No.5405 of 1997 is made absolute in terms of prayer clauses (a) and (b). It is made clear that the suit stands dismissed as against the Respondents against whom this Appeal from Order stands dismissed and the suit is restored is only as against the rest of the Respondents.

(ii) The restoration of the suit will be subject to the Appellants paying a costs of Rs.5000/- to the Respondent No.10 within a period of eight weeks from today. The payment of costs shall be condition precedent.

(iii) The Appeal is allowed in above terms.

(iv) The parties and the concerned trial Court to act on an authenticated copy of this

order.

13. At this stage the learned Counsel for the Respondent No.10 pointed out that between the same parties there are two connected suits pending in the trial Court. If that is so, liberty to the parties to apply for direction for placing the suit which is restored for hearing along with the connected suits.

Judge.